

Before the
Federal Communications Commission
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of the Commission's) WT Docket No. 97-82
Rules Regarding Installment Payment)
Financing For Personal Communications)
Services (PCS) Licenses)
)

REPLY OF OMNIPOINT CORPORATION

In its November 24, 1997 "Petition for Reconsideration and Clarification" (the "Petition") of the Second Report and Order¹ ("Second R&O"), Omnipoint Corporation ("Omnipoint") requested the Commission to ensure fairness for those Block C entrepreneurs that had bid by the auction rules, that had not requested Block C "relief" which is now causing significant uncertainty, and that are now continuing to build-out and provide service to the public on Block C spectrum.

To meet those goals, Omnipoint suggested that the Commission take the following actions on reconsideration:

- Clarify that the "Built-Out" exception permits disaggregation. The current Built-Out exception provides no relief for the specific BTA licenses that have met the Built Out test, and actually entraps small businesses that have worked to bring service to the public. Such

¹ In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Second Report and Order and Further Notice of Proposed Rule Making, WT Dkt. No. 97-82, FCC 97-342, 62 Fed. Reg. 55348 (Oct. 24, 1997).

operators should have the same effective opportunities for disaggregation as all other Block C licensees.

- Eliminate the current Prepayment Option because it amounts to nothing other than an opportunity for a handful of the largest bidders to "cherry-pick" licenses with their deposits banked at the Commission. This option discriminates against all other bidders who would have had no way of knowing that this was a possibility during the auction.
- If the Prepayment Option is retained, modify the Prepayment and Disaggregation Options so that licensees receive the same credit, if any, on their Block C down payment.
- Modify the election procedures so that the parties that control the scope of the re-auction must make an election first. As discussed in Omnipoint's Petition and below, the current single-day election puts all other Block C licensees at a disadvantage vis-a-vis NextWave, due to NextWave's extraordinary dominance of the initial Block C auction. A staggered election will provide all parties a "level playing field," and prevent Nextwave from "gaming" the reauction.
- Provide all three relief options for entrepreneurs that won licenses in the Block D, E, and F auction.
- Reduce the uncertainties for small businesses by resolving several issues, including the Commission's position on bankruptcy and coordination with other federal agencies (e.g., DoJ, GAO) on the process of debt forgiveness.

Many parties, in both petitions for reconsideration and in comments on those petitions, support the same goals as Omnipoint.

NextWave, of course, opposes Omnipoint's proposal that NextWave "go first" in the Block C election process. NextWave Telecom Inc., "Opposition to Petition for Reconsideration" (filed Dec. 29, 1997). Feigning incredulity, NextWave asserts that Omnipoint's position is a "blatant and cynical attempt to manipulate the Commission's rules to personal advantage." *Id.* at 2.

Not so. As Omnipoint suggested in its Petition, if NextWave "goes first" the election process improves, and the public interest is served, because all small business licensees would be better able to (a) assess the likelihood of a fulsome re-auction of Block C spectrum; (b) make a more rational election decision, having the knowledge of which of NextWave's prodigious number of licenses will or will not be in the re-auction; and (c) avoid anomalous decisions that

may prove, in retrospect, to have been detrimental to licensees, consumers, and investors. Additionally, by providing small businesses with more complete information on the re-auction, the Commission will avoid the need for additional relief after the re-auction.

NextWave's dominance of the initial Block C auction is indisputable. For example, NextWave individually holds 29 licenses out of the top 50 Block C markets, including 5 licenses out of the top 10 markets and 23 licenses out of the top 40 markets. This dominance resulted in NextWave obtaining licenses for 60.5% of the total Block C POPs in the top 50 Block C markets. It achieved this remarkable dominance, and defeated a host of other bidders, by bidding equally remarkable prices. NextWave individually bid approximately 42% of the entire net high bids for all of the Block C auctions. In effect, NextWave bought options on Block C licenses for approximately 111 million pops out of a total U.S. population of 268 million (based on 1996 population estimates). By refusing to go first, NextWave will continue to keep all other bidders guessing whether NextWave will return its licenses. In the face of these facts, NextWave incredibly claims that its election decision would not "have a controlling effect on all other C block licensees." NextWave Opposition at 3.

An election process where NextWave goes first would be more fair and efficient for all other Block C licensees than the current single-day election process. If the current single-day election is employed, NextWave would obtain a significant competitive advantage vis-a-vis all other bidders because it alone knows and, indeed, could again game, the re-auction status of a majority of the top 50 Block C markets. Thus, Omnipoint's proposal for a staggered election process is not for the purpose of advantaging Omnipoint. Rather, it simply would provide all other licensees, at the time when they must make their election decisions, with the same information that only NextWave now possesses. This would make the re-auction fair to all parties, and promote the public interest by better ensuring the election process cures, once and for all, the Block C financing problems.

Finally, we note that NextWave is simply wrong when it suggests that the Commission lacks authority to structure an election process whereby it "goes first." NextWave Petition at n.10. Indeed, for the past year, NextWave has been arguing that it is well within the Commission's authority to provide relief to Block C licensees. Certainly, that authority also encompasses the ability to take into account the inherent unfairness of a simultaneous election. Of course, Commission relief must be implemented in a manner that is equitable for all parties, not one that advantages a single party -- NextWave -- because of its dominance in the first auction. NextWave's licenses do not provide it with "an absolute unqualified right" to extraordinary Block C relief on terms that are optimal to NextWave.² Moreover, contrary to NextWave's assertion, a Block C relief plan that takes these competitive issues into account -- such as a staggered election process -- is not a modification of NextWave's Block C authorization, and is otherwise fully compliant with the Commission's Sections 303(r) and 309 authority.³

In the alternative, if the election dates are not sequenced, and NextWave does not return its licenses, then all other bidders returning any spectrum or licenses should have the option to


² Music Broadcasting Co. v. FCC, 217 F.2d 339, 342 (D.C. Cir. 1954).

³ WBEN, Inc. v. United States, 396 F.2d 601, 617-618 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968) (Commission may alter rights of licensee acting pursuant to public interest rulemaking authority of Section 303(r)); Hispanic Info. & Telecommunications Network v. FCC, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989) (no individual hearing is necessary when FCC has acted through notice and comment rulemaking to alter license application standards).

rescind their election decision. Otherwise, the entire Block C auction will have, once again, been gamed by NextWave, to its sole advantage.

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CERTIFICATE OF SERVICE

I, Mark J. O'Connor, hereby certify that a copy of the attached "REPLY" was served this
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